

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 10, 2016**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2015AP1905**

**Cir. Ct. No. 2011CV818**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**JFM1, LLC AND NRFC MEMORIAL HOLDINGS, LLC,**

**PLAINTIFFS-RESPONDENTS,**

**v.**

**CITY OF SHEBOYGAN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Affirmed.*

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. The City of Sheboygan (City) appeals from a judgment awarding a tax refund to JFM1, LLC, and NRCF Memorial Holdings, LLC, (collectively JFM) for excess taxes levied on the Memorial Mall (Mall) in the four years spanning 2010 through 2013. The City argues that the circuit court

was required to consider a 2015 posttrial transaction which included the sale of the Mall together with an adjacent Sears store and land parcel in determining the Mall's 2010-2013 value, either because it constituted a recent arm's-length sale of the Mall or because it reflected on the Mall's highest and best use for purposes of a comparable sales analysis. We reject the City's arguments and affirm.

¶2 For purposes of taxation, the City set the Mall's value as of January 1, 2010, 2011, 2012, and 2013, at \$12,424,000. JFM challenged the City's assessments as excessive under WIS. STAT. § 74.37 (2013-14).<sup>1</sup> At a court trial, both parties presented expert testimony concerning the Mall's value through evidence of comparable sales. The parties' experts substantially agreed that the Mall's highest and best use was as a regional mall. The circuit court ordered posttrial briefing.

¶3 In November 2014, about three months after the trial concluded but before the circuit court issued a decision, JFM purchased the Sears store and land parcel attached and adjacent to the Mall. In March 2015, JFM sold the Mall along with the Sears property (the combined properties) to Meijer stores for \$10,750,000. The circuit court ordered the parties to brief whether and how the combined sale to Meijer impacted the central issue at trial, namely, the Mall's value during the four years at issue.

¶4 Thereafter, in a lengthy written decision, the circuit court determined that during the tax years 2010-2013, the value of the Mall ranged between \$3,710,000 and \$4,600,000 dollars. In reaching these values, the circuit court

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

analyzed the comparable sales values provided by the parties' experts. The circuit court found that during the tax years in question, the Mall property's highest and best use was as a regional mall on an interim basis and that JFM's expert provided the most reliable and credible numbers.

¶5 The circuit court declined to consider the 2015 sale to Meijer in determining the Mall's 2010-2013 assessed value. Though the court acknowledged the City's argument that pursuant to the real estate transfer return, \$8,346,877 of the combined sale was allocated to the Mall property, the circuit court emphasized that Meijer purchased the Mall together with the Sears property, and that it did so with the intent that the combined properties be used for a different higher and best use, namely, a single super store without the pitfalls of a declining mall. The circuit court stated:

The 2015 sale shouldn't influence the court's decision regarding the value of the Mall between 2010 and 2013 because it is apparent that the sale to Meijer wasn't anticipated during that time, and according to the Manual, the highest and best use should not be a highly speculative use.

The circuit court determined that between 2010 and 2013, JFM paid excess taxes in the amount of \$806,439 and entered judgment in JFM's favor.

¶6 For taxation purposes, real property is to be valued by the assessor "in the manner specified in the Wisconsin property assessment manual." *See* WIS. STAT. § 70.32(1). Wisconsin prescribes a three-tier hierarchy for determining a property's value. *Adams Outdoor Adver., Ltd. v. City of Madison*, 2006 WI 104, ¶34, 294 Wis. 2d 441, 717 N.W.2d 803. Tier 1, which is a recent arm's-length sale of the property being assessed, is the best evidence of that property's value. *Id.* If there has been no recent tier 1 sale of the subject property, an assessor or

appraiser conducts a tier 2 analysis, which involves consideration of sales of reasonably comparable properties. *See id.* Regardless of which approach is utilized, the subject property must be assessed at its highest and best use. *Nestlé USA, Inc. v. DOR*, 2011 WI 4, ¶27, 331 Wis. 2d 256, 795 N.W.2d 46. The highest and best use must be legal, complementary, and not highly speculative. *Id.*

¶7 When deciding an excessive tax claim brought pursuant to WIS. STAT. § 74.37, the circuit court conducts an independent review and may hear new evidence not considered in an earlier proceeding. *See Nankin v. Village of Shorewood*, 2001 WI 92, ¶25, 245 Wis. 2d 86, 630 N.W.2d 141. On appeal, the circuit court’s findings of fact will not be overturned unless clearly erroneous. *Bloomer Hous. Ltd. P’ship v. City of Bloomer*, 2002 WI App 252, ¶12, 257 Wis. 2d 883, 653 N.W.2d 309. Where there is conflicting testimony, the weight and credibility afforded the opinions of expert witnesses is a determination for the circuit court. *Id.*

¶8 On appeal, the City contends that the circuit court erred as a matter of law by not considering the 2015 sale of the combined properties when determining the Mall’s value for tax years 2010 to 2013. Specifically, the City argues that the combined sale constituted a tier 1 recent arm’s-length sale of the property being assessed and that the circuit court was required to set the Mall’s value as of January 1, 2010, 2011, 2012, and 2013, at \$8,346,877, its allocated sale price as reflected on the real estate transfer return. We disagree.

¶9 The March 2015 sale to Meijer of the combined properties included the Sears store and parcel and was therefore not a sale of “the property” whose assessment was disputed at trial. *See Forest Cty. Potawatomi Cmty. v. Township*

*of Lincoln*, 2008 WI App 156, ¶16, 314 Wis. 2d 363, 761 N.W.2d 31 (“[T]o properly rely on a recent arm’s-length sale, the sale must be of ‘the property.’”). *Forest County* involved the sale of real estate and nonreal estate assets of which the assessor allocated a specific portion of the overall purchase price to the land at issue. *Forest Cnty.*, 314 Wis. 2d 363, ¶¶4-5. The *Forest County* court held that the sale did not constitute a recent arm’s-length transaction for purposes of assessment because the allocation of the sale price to the subject property inherently relied on judgment. *Id.*, ¶¶16, 19. The court explained that “looking at what a given property recently fetched in an open-market sale eliminates any guesswork or extrapolation. Knowing what a property *actually* sold for obviates inquiry into what it *might* sell for.” *Id.*, ¶17 (alteration in original).

¶10 As in *Forest County*, the March 2015 sale of the combined properties to Meijer involved a different configuration than the sale of the Mall alone. It is undisputed that Meijer purchased the combined properties for redevelopment and would not have purchased the Mall without the Sears property. To speculate on what any buyer would have paid for the Mall alone requires the exercise of subjective judgment which makes it inappropriate to rely on the combined sale as a recent arm’s-length transaction. Additionally, the sale of the combined properties to Meijer was only made possible when JFM purchased the Sears property. As such, the particular configuration of the combined properties’ sale did not exist between 2010 and 2013, and the posttrial transaction which occurred more than sixty-two months after the first assessment and more than twenty-six months after the final assessment is not an appropriate gauge of the Mall’s value during the four years in issue.

¶11 We also reject the City’s argument that the circuit court erred in determining that the highest and best use for the Mall in 2010 to 2013 was as a

regional mall on an interim basis. Here, the City apparently asserts that because Meijer anticipates using the combined properties for redevelopment, the circuit court should have made a retroactive finding that the Mall's highest and best use in 2010 to 2013 was for redevelopment and that this should have informed the circuit court's analysis of the experts' proffered comparable sales. The circuit court's highest and best use determination for the four years in question was based on and amply supported by the trial testimony of the parties' expert witnesses and is not clearly erroneous.<sup>2</sup> On the evidence presented, a contrary finding would have been speculative. *See Nestlé*, 331 Wis. 2d 256, ¶27. A subsequent highest and best use contemplated in a 2015 sale of differently configured property does not compel a determination that the Mall's highest and best use from 2010 to 2013 was other than as a regional mall on an interim basis.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

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<sup>2</sup> In its reply brief, the City argues that “JFM cited no case in which conclusions about highest and best use are factual determinations, rather than legal determinations which are reviewed de novo.” Curiously, the City fails to cite to any case holding that a property's highest and best use is a question of law for the reviewing court. Regardless, we find no factual or legal error in the circuit court's determination that the Mall's highest and best use from 2010 to 2013 was as a regional mall on an interim basis. The experts charged with applying the Wisconsin property assessment manual were in agreement on this issue and the City provides no authority for the proposition that as a matter of law, the Mall's highest and best use during the tax years in question was for redevelopment.

